No. 87-1080

Supreme Court, U.S.
FILED
FEB 12 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARYLAND NATIONAL BANK,

Appellant,

v.

STATE DEPARTMENT OF ASSESSMENTS AND TAXATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

H. THOMAS HOWELL,*
HERMAN B. ROSENTHAL,
T. SCOTT BASIK,
SEMMES, BOWEN & SEMMES,
250 West Pratt Street,
Baltimore, Maryland 21201,
(301) 539-5040,
Attorneys for Appellant.

Counsel of Record

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983)	6,8,10
Farmers & Traders State Bank v. Johnson, 121 Ill. App. 3d 43, 458 N.E.2d 1365 (1984) . .	12
Maricopa County v. Valley Nat'l Bank, 318 U.S. 357 (1943). . .	3,6
McCulloch v. Maryland, 4 Wheat. 316 (1819).	5
Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983). .	13
Owensboro Nat'l Bank v. City of Owensboro, 173 U.S. 664 (1899)	3,7

Page

Protest of First Federal Savings & Loan Association, 743 P.2d 640 (Okla. 1987), appeal filed sub nom. First Federal Savings & Loan Association of Claremore v. Oklahoma Tax Commission, 56 U.S.L.W. 3501 (Jan. 26, 1988) (No. 87-1133). 12

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976). 14

Smith v. Davis, 323 U.S. 111 (1944) 12

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 4

Society for Savings v. Coite, 6 Wall. 594 (1868) 6

Society for Savings in the City of Cleveland v. Bowers, 349 U.S. 143 (1955). 5

Tradesman Nat'l Bank v. Oklahoma Tax Commission, 309 U.S. 560 (1940). 7

Werner Machine Co. v. Director of Division of Taxation, 350 U.S. 492 (1956). 2,3

Constitutional Provisions and Statutes

U.S. Const. art. VI, cl. 2 (Supremacy Clause) 5

Page

12 U.S.C. §411 (1982). 14

12 U.S.C. §548 (1982). 3,9,10

12 U.S.C. §1433 (1982) 8,9,10,13

12 U.S.C. §1435 (1982) 11,12

31 U.S.C. §742 (1976)
(current version at
31 U.S.C. §3124 (1982)). . . . 3,10

31 U.S.C. §3101(b) (1982). . . . 11

31 U.S.C. §3123(a) (1982). . . . 11

31 U.S.C. §3124(a) (1982). . 11,12,13,14

31 U.S.C. §5154 (1982) 14

Miscellaneous

Letter of Jan. 13, 1976 from the
Federal Home Loan Bank Board,
Office of General Counsel. . . 8

Sup. Ct. R. 16.5 2

No. 87-1080

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Maryland National Bank

Appellant

v.

State Department of Assessments and Taxation

Appellee

On Appeal from the Court of Appeals of Maryland

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Maryland National Bank,[1/] Appellant,

[1/] A listing of Maryland National Bank's parent company, subsidiaries (except wholly owned subsidiaries) and affiliates is found on pages ii and iii of its Jurisdictional Statement.

submits this brief in opposition to Appellee's Motion to Dismiss or Affirm pursuant to Supreme Court Rule 16.5. Appellant believes it necessary to point out certain misstatements of the law asserted by Appellee in its Motion.

In its Motion, the State of Maryland argues that this case is controlled by a line of cases holding that states are permitted to consider otherwise tax-exempt income on federal securities in calculating the amount of corporate franchise and other "privilege" taxes. Motion, at 5-7. These cases hold that the implied constitutional immunity of federal obligations from direct state taxation is not violated when a state indirectly bears upon tax-exempt property or income by taxing the privilege of doing business in corporate form. See, e.g., Werner Machine Co. v. Director of

Division of Taxation, 350 U.S. 492, 494 (1956), and cases cited therein. "Corporate franchises granted by a State create a relationship which may legitimately be made the subject of taxation." Id. at 493.[2/]

The State's argument disregards the comprehensive statutory immunity of FHLB

[2/] Of course, the State utterly fails to identify any "privilege" that Maryland has conferred upon the Maryland National Bank, whose franchise was granted under the National Banking Act. The franchise and its exercise are in no sense "privileges" granted by Maryland. Although Congress has consented to the imposition of state franchise taxes upon national banks, 12 U.S.C. §548, such consent merely enabled the states to do what was otherwise forbidden by the Constitution. Owensboro Nat'l. Bank v. City of Owensboro, 173 U.S. 664, 668-69 (1899). "When Congress authorized the States to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked." Maricopa County v. Valley Nat'l. Bank, 318 U.S. 357, 362 (1943). Maryland's right to tax a "privilege" which it did not create and cannot deny is little more "than a gratuity or bounty" extended by Congress. Id. at 362.

bonds from all state taxation, direct or indirect, except as expressly provided in 12 U.S.C. §1433. That Congress may exempt such securities from all forms of taxation, including franchise taxes, is undeniable. Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 212-214 (1921). The only question here is whether Congress, by enacting 12 U.S.C. §1433 and immunizing FHLB bonds from "all taxation" (except the privilege taxes stated therein), has consented to state franchise taxes measured by the interest on such bonds. Not one of the cases cited by the State addressed a statutory prohibition imposed by Congress upon state taxes not authorized by the enactment itself.

The State ascribes to Maryland an inherent constitutional right to reach interest earned on FHLB bonds under its

franchise tax, and argues that Congress has no power to curtail indirect state taxation of federally-created obligations. However, under the Supremacy Clause, Congress is certainly authorized to prohibit all state taxation of such obligations. See Society for Savings in the City of Cleveland v. Bowers, 349 U.S. 143, 144 (1955); McCulloch v. Maryland, 4 Wheat. 316 (1819). The State has not cited any case which addressed the validity of a state franchise tax measured by interest on federal obligations where Congress had provided that the principal and interest of such obligations were exempt from all taxation, with precisely enumerated exceptions in the statute.

Indeed, this Court confirmed implicitly that Congress has absolute authority to prohibit indirect state taxation of

federal obligations. In American Bank and Trust Co. v. Dallas County, 463 U.S. 855 (1983), this Court held that the Texas bank shares tax could not be measured by federal obligations because Congress had not permitted states to impose indirect shares taxes on such obligations. Id. at 864. This Court did not suggest, even as a remote possibility, that the State of Texas had a constitutional right to override Congress by imposing an indirect tax measured by federal obligations.[3/]

[3/] American Bank is the latest of this Court's precedents indicating that the states have no constitutional right to impose an indirect tax on obligations of federal instrumentalities if Congress provides to the contrary. See Maricopa County v. Valley Nat'l. Bank, 318 U.S. 357, 361 (1943) (Congress has exclusive authority under the Constitution to determine whether and to what extent its instrumentalities shall be immune from state taxation); Society for Savings v. Coite, 6 Wall. 594, 605 (1868) (state power to tax does not extend to those

(continued...)

The State asserts that there is nothing in the FHLB Act or its legislative history which shows that Congress intended to depart from the concept that a state franchise tax can be measured in part by tax-exempt income. Motion, at 9. On the contrary, as we have demonstrated, the specific language of the Act, as well as its legislative history, indicates that Congress in 1932 intended such a departure in order to secure maximum protection for FHLB bonds. Jurisdictional Statement, at 11-17. Moreover, as

---

3/ (...continued)
means employed by Congress to carry into execution the powers conferred by the Constitution); Owensboro Nat'l Bank v. City of Owensboro, 173 U.S. 664, 668 (1899) (states are wholly without power to levy a tax, either direct or indirect, on the franchise of a national bank except so far as for the permissive legislation of Congress allows it); Tradesman Nat'l Bank v. Oklahoma Tax Commission, 309 U.S. 560, 564 (1940) (Congress alone has the power to authorize a state to impose a tax on the franchise of a national bank).

this Court observed in American Bank & Trust Co. v. Dallas County, supra, the burden is on the State to demonstrate "a clearly expressed legislative intention" contrary to the particular statutory language. Id., 463 U.S. at 862. This the State has failed to do.

The State also quotes an opinion of general counsel for the Federal Home Loan Bank Board "that there was no legal impediment to the inclusion of FHLB stock in income for purposes of calculating Florida's franchise tax." Motion, at 8-9. The State quotes the opinion out of context, however. The question considered by FHLB counsel involved an entirely different part of 12 U.S.C. §1433 relating to the taxation of stock dividends, not the tax-exempt interest on FHLB bonds. The statutory language involved in the referenced opinion

provided for an exemption from state taxes without specific reference to any form of indirect taxation. However, that part of §1433 which applies to interest earned on FHLB bonds is significantly different, and was not addressed in the opinion of FHLB counsel.

The State points to a former version of 12 U.S.C. §548 and faults the Bank because it did "not address the 1926 statute in its jurisdictional statement." Motion, at 11. However, the 1926 statute was not addressed because the Court of Appeals of Maryland, undoubtedly persuaded by the Circuit Court that the statute was irrelevant (App., pp. a19-20), did not mention or rely upon it.

In any event, the State's reference to the 1926 version of 12 U.S.C. §548 (Motion, at 10-11) is a thinly-veiled invitation for this Court to overrule

American Bank & Trust Co. v. Dallas County, supra. In that case, which the State fails to acknowledge, this Court declared that the specific concern of Congress in 1926 in enacting §548 related to the ability of states to tax national banks, not the ability of states to levy taxes with respect to federally-created obligations. Id., 463 U.S. at 870. This Court held that the fact that former §548 permitted a state bank shares tax did not mean that the shares tax would be valid if it violated a different federal statute (31 U.S.C. §742). American Bank refutes the State's argument that the exemption of FHLB bond interest from state taxation, as provided in 12 U.S.C. §1433, somehow "collides" with the 1926 version of 12 U.S.C. §548 (Motion, at 10).

Finally, the State asserts that FHLB bonds are "obligations of the United States Government" under 31 U.S.C. §3124(a) and thus fall within its exception for nondiscriminatory state franchise taxes. Motion, at 13-17. However, when read in conjunction with companion statutes, §3124(a) describes those "obligations issued under this chapter" (i.e., Chapter 31 of Title 31) and those "obligations whose principal and interest are guaranteed by the United States Government." See 31 U.S.C. §3101(b). See also, 31 U.S.C. §3123(a). Because 12 U.S.C. §1435 is specific in providing that FHLB bonds are not obligations of the United States, and are not guaranteed by the United States, §3124(a) cannot apply to FHLB bonds.

In contending that 12 U.S.C. §1435 "clearly has nothing to do with taxes"

(Motion, at 16), the State contradicts Smith v. Davis, 323 U.S. 111 (1944). See also Protest of First Federal Savings & Loan Association, 743 P.2d 640 (Okla. 1987), appeal filed sub nom. First Federal Savings & Loan Association of Claremore v. Oklahoma Tax Commission, 56 U.S.L.W. 3501 (Jan. 26, 1988) (No. 87-1133); Farmers & Traders State Bank v. Johnson, 121 Ill. App. 3d 43, 458 N.E.2d 1365 (1984). In Smith, this Court held that the statutory language now codified in 31 U.S.C. §3124(a) applies only to those obligations "for the payment of which the credit and faith of the United States was pledged." Smith, 323 U.S. at 118. The express disclaimer of such a pledge in 12 U.S.C. §1435 undermines the State's argument, which assumes that FHLB bonds constitute "obligations of the United States Government" under §3124(a),

while disregarding the fact that the bonds are not backed by the full faith and credit of the United States.

Furthermore, even if §3124(a) did apply in its general terms, the specific provisions of §1433 must necessarily prevail. Jurisdictional Statement, at 23-25. Whether §3124(a) yields to the broader immunity conferred by other statutes was an issue expressly reserved in Memphis Bank & Trust Co., v. Garner, 459 U.S. 392, 396 n.5 (1983), but is squarely raised in this appeal. The State is most unpersuasive when it ignores the Memphis Bank footnote and then pretends that the issue is foreclosed by precedent.

In a futile attempt to prove that "obligations of the United States" mean one thing in Title 12 but something else in Title 31, the State suggests that a

correct decision of this appeal "would lead to the bizarre result that cash--also referred to as 'obligations of the United States' * * * would be immune from direct State taxation under Section 3124." Motion, at 16. Federal Reserve Notes are indeed "obligations of the United States" under 12 U.S.C. §411, but are not even arguably tax-exempt under 31 U.S.C. §3124(a) because Congress has provided unequivocally since 1894 that all currency (including Federal Reserve Notes) may be taxed by the States. See 31 U.S.C. §5154. Once again, the State's example proves our point "that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." Radzanower v. Touche Ross & Co,, 426 U.S. 148, 153 (1976).

CONCLUSION

For the reasons set forth herein and in the Jurisdictional Statement, Maryland National Bank respectfully submits that the questions presented in this appeal are substantial and that this Court should note probable jurisdiction in this case.

Respectfully submitted,

H. THOMAS HOWELL *
HERMAN B. ROSENTHAL
T. SCOTT BASIK

Semmes Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Appellant
* Counsel of Record